being the highest ranking and 4 being the lowest. The categories considered by Pittard were education, HR Manager experience,[8] total HR experience,[9] references,[10] community involvement,[11] willingness to relocate, motivation and drive,[12] presence,[13] and relationship with the union.[14] The matrix was as follows:

	Ed	HR Mgr Exp	Tot HR Exp	Ref	Comm Inv	Loc in area	Mot Drive	Presence	Union Rel.
Petitioner	3	4	2	4	3	3	3	4	3
Higgins	2	1	1	3	4	3	4	3	4
Burdick	2	2	3	2	1	1	2	2	2
Carter	1	3	4	1	2	2	1	1	1

Pittard decided that Carter was the most qualified for the position because she had a dual college degree; she was bilingual; she had great successes in her current plant; she had

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[8] This category ranked years as a Plant HR Manager.

[9] This category ranked the total number of years each candidate worked in human resources. Pittard determined this ranking by examining the candidates' resumes.

[10] Carter's rating was based upon Pittard's conversation with her supervisors. Petitioner's, Higgins' and Burdick's ratings were based upon Pittard's conversations with Taylor, Waller, Trotter and Whittaker as well as his own knowledge of their work history and performance.

[11] Pittard ranked the candidates' community involvement based upon their interview discussion of community involvement.

[12] This ranking was based on the enthusiasm of the candidate in the interview and their display during the interview of self-motivation in their current position.

[13] This ranking was based on the candidates' ability to stay focused and on track while responding to questions during the interview, answering the questions asked, answering the questions accurately, and presenting themselves appropriately during the interview process.

[14] Petitioner's, Higgins', and Burdick's ratings were based on Pittard's conversations with union representative Johnny Whittaker and Carter's rating was based upon Pittard's conversation with her supervisors and her interview.

high references; she was willing to relocate; she exhibited a high degree of enthusiasm and motivation for the job; and she interviewed extremely well. During her interview Carter gave specific answers to Pittard's questions and gave descriptions of programs that she initiated in her current role as Plant HR Manager. Pittard also felt that Carter was innovative because she developed solutions to tough problems.

Pittard informed Schaeffer that he wanted to offer Carter the position. Schaeffer asked Pittard if he would postpone the announcement of his selection to allow Carter to interview for the Pine Bluff, Arkansas, Complex HR Manager position. Pittard agreed not to announce his decision until after Carter interviewed for the Pine Bluff position. Pittard called Carter that day and told her that the job was hers, but that he had been asked to wait on the official announcement and allow Carter to interview for the Pine Bluff position. Pittard told Carter not to let the people at Pine Bluff talk her out of taking the Oxford position. Carter interviewed in Pine Bluff for the Complex HR Manager position with the understanding that she had already been offered the same position in the Oxford Complex. Carter was offered and decided to accept the Pine Bluff position. Upon learning of Carter's decision to accept the Pine Bluff position, Pittard's second choice for the Oxford Complex HR Manager was Burdick.

During this same time period, but before petitioner became aware of the final Oxford decision, petitioner interviewed for and was offered the position of Plant Manager of the Cleveland, Mississippi plant, the highest ranking position in the plant. Petitioner decided to decline the opportunity to become Plant Manager at the Cleveland plant, primarily because she did not want to relocate her family.

Upon learning of Pittard's decision to promote Burdick, petitioner e-mailed Don Schaeffer and also spoke with Cathy Clark (African-American female and EEO/AA Director) regarding her disappointment in the decision. Petitioner met

with Schaeffer about the promotion decision and was informed of the criteria used by Pittard and the scores of the candidates. Petitioner also e-mailed Dan Serrano about Pittard's decision to promote Burdick and was informed by Serrano that one of the primary reason for the decision was Burdick's exemplary implementation of the RISE program.[15] In addition, Serrano informed petitioner that Carter was originally offered the position.

The next day, petitioner e-mailed Serrano, Clark, Michelle Eisner, and Carl Johnson regarding her dissatisfaction with the decision. Petitioner's letter explained her disagreement with the criteria used for making the selection. On September 5, 2000, petitioner sent a letter to Clark, Eisner, Johnson and LaDonna Bornhoft, lodging an official complaint regarding the decision and alleging that the categories used for the decision were designed to play to Burdick's attributes.

After receiving petitioner's formal complaint, Clark notified Eisner, Senior Vice President of Human Resources, and told her she (Clark) would investigate the complaint. During the course of her investigation, Clark interviewed petitioner, Higgins, Pittard, and Trotter. In addition to the interviews, Clark also reviewed petitioner's internal complaint, the job summary, and the personnel files and resumes of the three remaining candidates, petitioner, Higgins, and Burdick. During Pittard's interview with Clark, he told her that all of the candidates were good, and that he originally offered Carter the position, but she declined it. Pittard expressed disappointment that Carter did not accept the position. He further explained that he selected Carter because she met the requirements for what he was seeking in the position. Pittard also

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[15] The RISE program was a program Burdick implemented in an effort to reduce turnover at the plant where Burdick worked as the HR manager. In the first year of the program, Burdick successfully reduced the turnover rate from 250% to 114%.

stated that once Carter declined the position, he felt that, of the remaining candidates, Burdick was the best candidate because she had done a very good job as Ashland's Human Resources Manager and the quality of her work was good. Pittard also discussed a few of his concerns relative to petitioner including his belief that petitioner was better at operations than human resources and would make an outstanding plant manager for Tyson. Pittard also felt that petitioner had some shortcomings in terms of her interactions with Tyson team members.

After Clark reported the substance of the interviews to Eisner, Eisner instructed her to coordinate a panel review of the promotion decision. Eisner further instructed her to get a diverse group to participate on the panel and to engage an outside firm to assist in the review process. In determining the make-up of the panel, Clark looked at corporate human resources directors and selected a diverse group of candidates. She selected an African-American male, Leonard Parks, and Peggy Roles, a white female, both of whom were divisional HR Managers. She also selected David Mantooth, VP of Operations (Native American male) and Eugene Eggman, another divisional HR Manager (white male). In preparation for the review, Clark provided the panelists with the names of the candidates and a description of the Complex HR Manager position. Fortune Personnel Consulting, a firm based out of Huntsville, Alabama, was engaged by Tyson to facilitate the review process. David Harris, President of Fortune, was personally responsible for overseeing the review.

Clark notified petitioner that she would have a second interview (as a part of the review) for the Oxford position. Clark further explained that an interview process called Topgrading (developed by Harris) was going to be utilized and that the questions were designed to elicit the candidates' assessments of their own competencies in the following areas: intellectual, personal, interpersonal, management, leadership,

and motivational. Clark also notified petitioner of the names of the panelists and told her that the entire interview process should take three and a half hours. Higgins and Burdick were also interviewed as a part of the panel's review.

Prior to the interviews, the panelists met with Harris, the facilitator of the interviews, and he discussed with them the interview process and the questions that would be asked of each candidate. Each panelist was also given a copy of the candidates' resumes to review before their interviews. In addition, before the interviews began, Harris informed the panel that it was the panel's charge to make the best selection for the position and that whomever the panel selected would be placed in the position. The individual candidates were not discussed among the panel members prior to the interviews. Harris explained to petitioner at the beginning of her interview that he would ask the questions and that the panelists would take notes as she responded. During the interviews, each candidate was asked the same questions. Harris asked the majority of the questions and occasionally one of the panelists would ask a follow-up question for clarification or elaboration. At the end of each candidate's interview, Harris led a discussion where the panel reviewed their opinions of the candidate's strengths and weaknesses.

After the interviews, each panelist had ranked the candidates in the following manner:

Mantooth	Roles	Eggman	Parks
1. Burdick	1. Burdick	1. Burdick	1. Higgins[16]
2. Higgins	2. Higgins	2. Higgins	2. Burdick
3. Petitioner	3. Petitioner	3. Petitioner	3. Petitioner

[16] While Parks believed that Higgins should have been the successful candidate because of her seniority, he believed that Higgins and Burdick were equally qualified, and that Burdick was more qualified than petitioner.

All of the panelists, including Parks (African American) ranked petitioner as their last choice for the promotion.

After the interviews were completed, the panelists formulated a summary of the candidates' strengths and weaknesses based on the interviews. The panel ultimately recommended that Burdick was the candidate who best fit the Oxford Complex HRM position.

REASONS FOR DENYING THE WRIT

There is no split in the circuits on the question posed in the petition. Nor is there any other reason to review the lower court's fact-bound determinations, which are based on settled legal principles and are set forth in a terse, unpublished and non-precedential opinion. Accordingly, the petition should be denied.

ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARISONS OF QUALIFICATIONS.

In her petition before this Court, petitioner does not present any argument or analysis regarding the alleged "well-established inter-circuit conflict" regarding the standard to be applied in "comparative qualifications" cases, relying on the *Ash* and *Higgins* petitions regarding the same. Pet. at 7. As discussed at length in respondent's oppositions to these petitions, there is no split in the circuits as to the question posed in these petitions.

Following the guidance of this Court, the courts of appeals uniformly recognize that a Title VII plaintiff who seeks to establish pretext based solely on evidence of comparative qualifications must show that his or her qualifications were *markedly* superior to those of the candidate selected for a job or promotion. Although the lower courts have used different phrases to capture this concept, there is no meaningful difference between their various verbal formulations.

Even if there were any substantive difference, this case is an inappropriate vehicle for addressing the issue, because petitioner did not in fact claim that she was more qualified under the criteria that were actually used in this case. Instead, she claims she was more qualified under the standards that she believes *should have been used*, which is not a superior qualifications claim. Further, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

1. All of the courts of appeals that have addressed the question have concluded that a factfinder cannot base a finding of pretext solely on evidence of comparative qualifications unless the plaintiff establishes that his or her qualifications were markedly superior to those of the candidate chosen. This requirement is compelled by this Court's recognition that Title VII "was not intended to diminish traditional management prerogatives," *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981). Accordingly, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not itself expose him to Title VII liability, although this may be probative of... pretext." *Id.* (internal quotation marks and citations omitted). See also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 (1989) ("the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color") (internal quotation marks and citations omitted).

In compliance with these instructions, the courts of appeal have sought to ensure that courts and juries do not act as "super personnel departments" that "second guess" good faith business judgments. Because it is in the employer's own interest to select the most qualified applicant, an employer's judgment about qualifications is assumed to be made in good faith.

As the First Circuit has explained:

> in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . This result follows from a form of the business judgment rule. . . . Qualifications are notoriously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting "X" ahead of "Y." . . . In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong- headed, was anything more than a garden-variety mistake in corporate judgment. . . .

Rathbun v. *Autozone*, 361 F.3d 62, 74 (1st Cir. 2004) (citations and internal quotations omitted); see also *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) ("the court must respect the employer's unfettered discretion to choose among qualified candidates . . . (and not to act as a super personnel department that second guesses employers' business judgments)") (citation omitted); *Scott* v. *University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998) ("[d]isagreements over which applicant is more qualified are employment decisions in which we will not engage in the practice of second-guessing"); *Peters* v. *Lieuallen*, 746 F.2d 1390, 1393 (6th Cir. 1984) ("[t]he fact that a court may think that an employer misjudged the qualifications of an applicant does not in itself establish a Title VII violation."); *Millbrook* v. *IBP*, 280 F.3d 1169, 1181 (7th Cir. 2002) ("a court's role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employer's business judgments."); *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) ("courts, when analyzing the pretext issue, do not sit as super-personnel departments free to second-guess the business judgment of the employer"); *Fishbach* v. *D.C. Dept. of Correc.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("the court must respect the employer's unfettered discretion to choose among qualified candidates and [re-

member that the court] does not sit as a super-personnel department that reexamines an entities' business decisions").

Accordingly, to prevent second-guessing of presumptively good faith business decisions, the courts of appeals have uniformly insisted that plaintiffs who seek to show pretext based solely on a comparison of qualifications must demonstrate that their own qualifications were markedly superior. The lower courts have expressed this requirement in different ways, but their expressions all serve the same purpose, and do not differ in substance: First Circuit—plaintiff's "qualifications must be "**obviously superior**," *Rathbun*, 361 F.3d at 75; Second Circuit—"plaintiff's credentials . . . [must] be **so superior** . . . that 'no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected," *Byrnie*, 243 F.3d at 103; Fourth Circuit—"qualifications so **plainly superior** that the employer could not have preferred another candidate," *Dennis* v. *Columbia Collecton Med. Ctr.*, 290 F.3d 639, 648 n.4 (4th Cir. 2002); Fifth Circuit—"comparison of . . . qualifications does not reveal any **glaring distinction** that would support" a better qualified finding, *Scott*, 148 F.3d at 509; Seventh Circuit—"differences are **so favorable** to . . . plaintiff **that there can be no dispute among reasonable persons** of impartial judgment that the plaintiff was clearly better qualified," *Millbrook*, 280 F.3d at 1179; Ninth Circuit—plaintiff's qualifications must be "**clearly superior**," *Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995); Tenth Circuit—"the disparity in qualifications must be **overwhelming**," *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1319 (10th Cir. 1999); Eleventh Circuit—"disparities in qualifications . . . of **such weight and significance that no reasonable person**, in the exercise of **impartial judgment**, could have chosen the candidate selected over the plaintiff," *Lee* v. *GTE Florida*, 226 F.3d 1249, 1254 (11th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001); D.C. Circuit—plaintiff must be "**significantly better quali-**

fied," *Aka* v. *Washington Hospital Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (emphasis supplied).

2. Petitioner attempts to manufacture a conflict from variations in the foregoing verbal formulas. As discussed at length in Respondent's opposition to the *Ash* and *Higgins* petitions, there is no basis for claiming that there is "a well-established inter-circuit conflict." Pet. at 7. In fact, as a linguistic matter, there is no substantive difference between the two formulations. To say that plaintiff's qualifications are "clearly superior" simply means that the superiority of those qualifications is "without doubt or question." *Webster's Third New International Dictionary* (1971) at 420 (defining "clearly"). Although more colorful, the "slap in the face" test requires no more than this. In the Fifth Circuit, where "slap in the face" originated, Judge Jolly has explained that the phrase:

> is simply a colloquial expression that we have utilized to bring some degree of understanding of the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

Deines v. *Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).[17] In other words, "slap

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[17] The phrase had its origin in *Odom* v. *Frank*, 3 F.3d 839, 847 (5th Cir. 1993), where the Fifth Circuit explained that: "unless the disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise. . . ." Petitioner would turn an expression of judicial humility and restraint into an intrusive rant—the use of the phrase in its judicial context is incapable of such an extreme make-over.

in the face" should be understood to mean that there can be no "doubt or question" about the superiority of plaintiff's qualifications—*i.e.*, that they are "clearly superior." *Raad* v. *Fairbanks North Star Borough School District*, 323 F.3d 1185, 1194 (9th Cir. 2003).

Indeed, the most telling evidence that the standards are indistinguishable is the decision in *Lee*, the case in which the Eleventh Circuit first adopted the "slap in the face" phrase. See 226 F.3d at 1254. Applying that test to the evidence before it, the Eleventh Circuit concluded that the plaintiff "did not meet her burden [under the 'slap in the face' test] of establishing" pretext because her "evidence fell far short of establishing that she was *clearly more qualified* for the position than" the candidate selected. *Id.* at 1255 (emphasis added). Thus, the Eleventh Circuit itself has equated "slap in the face" with "clearly more qualified," which is identical to "clearly superior." Indeed, in this case, the Eleventh Circuit affirmed the district court's grant of summary judgment by stating that the petitioner "failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over [the petitioner] for the Oxford job." Pet. at 9a. This once again confirms that it views the "slap in the face" test as interchangeable with the formulations employed by other circuits.

b. Petitioner's general and unsupported statement that the Eleventh Circuit standard "has proven in practice to be impossible to satisfy," Pet. at 9, is similarly misleading. This claim ignores the realities of the court system and presupposes that published opinions represent the entire universe of cases that have involved the issue at hand. Obviously, in those cases where a court has concluded that sufficient qualifications evidence was presented by the plaintiff to survive a summary judgment or a motion for judgment as a matter of law, the result would be the issuance of a non-appealable

order. Undoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient but there is no published opinion reflecting that holding because the cases have settled, were tried to verdict without appeal or were otherwise resolved without an appeal or published decision.

3. Even if there was a conflict in the circuits over the evidentiary standard for proving pretext based solely on a plaintiff's superior qualifications—and there manifestly is not—this case would not be the proper vehicle for resolving such a conflict. Petitioner's claim below, and before this Court, is *not* that she was more qualified under the criteria that the decision-maker actually used. Petitioner asserted to the District Court, the Eleventh Circuit, and this Court, that she was the most qualified individual for the position based solely on her experience. Pet. at 18a. However, this argument ignores the actual criteria used by Pittard: education, HR Manager experience, total human resources experience, references, community involvement, willingness to relocate, motivation and drive, presence, and relationship with the union.

This disagreement over which decisional criteria were or should have been used to measure the qualifications of the respective job applicants precludes consideration of the first question petitioner seeks to raise. If Pittard in fact applied the criteria he said he applied, then petitioner was not better qualified, let alone markedly so, and the question of superior qualifications is not presented at all.

Moreover, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination. All four of the panelists determined that Burdick was the most qualified candidate for the position, and all four of the panelists ranked petitioner as the least qualified of all of the candidates. Even

if petitioner's alleged evidence regarding qualifications establishes pretext in Pittard's decision to promote Burdick (which it does not), it does not negate the finding of the independent review committee. As such, this case is not an appropriate vehicle for addressing any conflict regarding "comparative qualifications" claims.

4. Further, petitioner's assertion that the "reasonable person" standard applied by the Eleventh Circuit in this matter, a standard that is equivalent to the "slap you in the face" standard, requires the employee to "demonstrate that the employer's action would fail the rational basis test" is entirely erroneous. Pet. at p. 9. There is no logical basis for petitioner's assertion that a "reasonable person" standard is the same as a "rational basis test."

This Court has applied a rational basis test in determining whether state action violates the Fourteenth Amendment. See e.g., *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (determining that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational); *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 83 (2000)(holding that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.")[18] However, this matter does not involve state action, and the cases cited by petitioner in support of her "rational basis test" argument are entirely inapplicable to this matter.

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[18] In cases involving gender or race discrimination, states must establish a "tighter fit" than a rational basis, and the state action is "constitutional only if [it] is narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 227 (1995).

Moreover, this Court has repeatedly applied a "reasonable person" standard to many applications of discrimination law. See e.g., *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004)(stating that in order to establish a hostile environment constructive discharge claim, plaintiff "must show working conditions so intolerable that a **reasonable person** would have felt compelled to resign."); *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 361 (2001) (restating that the ADA requires employers to "make **reasonable** accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability")(quoting 42 U.S.C. § 12112(b)(5)(A)); *Clark County School District* v. *Breeden*, 532 U.S. 268, 270, 271(2001) (reversing the Court of Appeals for the Ninth Circuit's decision that the employee had established a claim of retaliation under Title VII, holding that "[n]o **reasonable person** could have believed that the single incident [alleged by the employee] violated Title VII."); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765 (1998)(holding that when no tangible employment action is taken, the employer affirmative defense is comprised of two elements: "(a) that the employer exercised **reasonable** care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee **unreasonably** failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)(holding that "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment—an environment that a **reasonable person** would find hostile or abusive—is beyond Title VII's purview.")(citing *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986)). It is clear that viewing evidence from a "reasonable person" perspective is consistent with this Court's holdings in many areas of discrimination law and is not a violation of the Equal Protection Clause as asserted by petitioner.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the Petition.

Respectfully submitted,

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